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**STATE OF WISCONSIN**  
**Division of Hearings and Appeals**

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In the Matter of

[REDACTED]  
c/o [REDACTED]  
[REDACTED]  
[REDACTED]

DECISION

MKB/146860

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**PRELIMINARY RECITALS**

Pursuant to a petition filed January 22, 2013, under Wis. Stat. § 49.45(5), and Wis. Admin. Code § HA 3.03(1), to review a decision by the Bureau of Long-Term Support in regard to Medical Assistance, a hearing was held on March 12, 2013, at West Bend, Wisconsin.

The issue for determination is whether the agency properly discontinued the Petitioner's eligibility under the Katie Beckett program.

There appeared at that time and place the following persons:

**PARTIES IN INTEREST:**

Petitioner:

[REDACTED]  
c/o [REDACTED]  
[REDACTED]  
[REDACTED]

Respondent:

Department of Health Services  
1 West Wilson Street  
Madison, Wisconsin 53703

By: Barbara Behrend  
Bureau of Long-Term Support  
1 West Wilson

Madison, WI

**ADMINISTRATIVE LAW JUDGE:**

Debra Bursinger  
Division of Hearings and Appeals

### FINDINGS OF FACT

1. Petitioner is a resident of Washington County.
2. The Petitioner is 5 years old. He has been eligible for Wisconsin MA through the Katie Beckett program since August 16, 2010. He was determined to have previously met the Nursing Home Level of Care (LOC).
3. Petitioner's diagnoses include bronchopulmonary dysplasia due to prematurity, oropharyngeal dysphagia, dysphonia/hoarseness with evidence of posterior glottis scarring, gastroesophageal reflux with feeding difficulties and status post patent ductus arteriosus ligation. He was born at 24 weeks gestation with a history of chronic lung disease that now presents as asthma. He is susceptible to respiratory infections and hospitalizations. He has a history of intermittent aspiration and is fed primarily with a G-tube 4x/day. He currently works with a feeding team on a feeding therapy to address problems with swallowing. He has difficulty with speech, expressing 2 - 4 small words. He can follow simple one step directions. He attends school 4x/week. He requires total assistance with eating and toileting. He is working on oral management of food and sensory issues. He wears a diaper at all times. He is independent with dressing, mobility and transfers. He needs some assistance with bathing and grooming.
4. On December 21, 2012, the agency received a Recertification for Katie Beckett program filed on behalf of the Petitioner.
5. On January 4, 2013, the agency issued a notice to the Petitioner's parents informing them that the Petitioner no longer meets a Level of Care to be eligible for the Katie Beckett program.
6. On January 22, 2013, an appeal was filed on the Petitioner's behalf with the Division of Hearings and Appeals.

### DISCUSSION

The purpose of the "Katie Beckett" waiver is to encourage cost savings to the government by permitting disabled children, who would otherwise be institutionalized, to receive MA while living at home with their parents. Wis. Stats., § 49.47(4)(c)1m. The agency is required to review Katie Beckett waiver recertification applications in a five-step process. The first step is to determine whether the child is age 18 or younger and disabled. Petitioner continues to meet this first standard. The second step is to determine whether the child requires a level of care that is typically provided in a hospital, nursing home, or ICF-MR. The agency determined that Petitioner no longer meets any level of care criteria. (The remaining three steps are assessment of appropriateness of community-based care, costs limits of community-based care, and adherence to income and asset limits for the child). Specifically, the agency determined that the Petitioner no longer meets the Nursing Home Level of Care that he previously met.

The Institutional Level of Care Manual states the following regarding the Nursing Home Level of Care:

The child with a Nursing Home – Physical Disabilities (PD) Level of Care has a long-term medical or physical condition, which significantly diminishes his/her functional capacity and interferes with the ability to perform age appropriate activities of daily living at home and in the community. This child requires an extraordinary degree of daily assistance from others to meet everyday routines and special medical needs. The special medical needs warrant skilled nursing interventions that require specialized training and monitoring that is significantly beyond that which is routinely provided to children. *The intensity and frequency of required skilled nursing interventions must be so*

*substantial that without direct, daily intervention, the child is at risk for institutionalization within a nursing home.*

A child may be assigned this level of care if the child meets BOTH of the criteria listed below for Physical Disability. The criteria are:

1. The child has a diagnosis of a medical/physical condition resulting in needs requiring long-term care services; and;
2. The child requires skilled Nursing Interventions and/or has Substantial functional Limitations requiring hand-on assistance from others throughout their day.

Institutional Levels of Care Manual, updated February 2011 (hereinafter “Manual”), p. 22.<sup>1</sup>

The Manual indicates that to meet criteria #2 regarding skilled nursing interventions and/or substantial functional limitations, the child must meet one of two standards:

Standard I: The child must demonstrate both a need for skilled nursing/therapeutic intervention plus two substantial functional limitations:

A. Needs and receives at least one skilled nursing intervention listed below that must be performed daily and is reasonably expected to continue at least six months.

OR

B. Needs and receives at least two skilled nursing/therapeutic interventions listed below that must be performed at least weekly . . .

Daily Skilled Nursing Interventions that apply to both Item A and B above are limited to the following and do not include site care: . . . Tube feedings: G-tube

C. The child exhibits substantial functional limitations when compared to age appropriate activities in at least two of the seven specific areas listed below that are reasonably expected to last at least one year. . .

1. Learning. A 30% (25% if the child is under one year of age) or greater delay or a score of at least 2 (1.5 if the child is under one year of age) standard deviations below the mean based on valid, standardized and norm referenced measures of aggregate intellectual functioning.

2. Communication: A substantial functional limitation in communication is defined as a 30% (25% if under one year) or greater delay or a standard score of at least 2 (1.5 if under one year) standard deviations below the mean on valid, standardized and norm referenced measures of both expressive and receptive communication functioning.

3. Self Care. Refer to Appendix B. . . Child must demonstrate a deficit in at least one of the following five areas of self-care: bathing, grooming, dressing, toileting, eating.

. . .

Standard II. The child must have substantial functional limitations requiring daily direct hands on assistance in at least four of the seven specific areas listed below that are

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<sup>1</sup> The agency’s written basis for denial indicates that eligibility was determined based on the Level of Care criteria dated January, 2010. I note that the latest update to the criteria is dated February, 2011 and will use that criteria here in reviewing the agency’s determination.

reasonably expected to last for at least one year. There is no requirement of skilled nursing or therapeutic intervention for this standards.

1. Learning . . .
2. Communication . . .
3. Bathing . . .
4. Grooming or Dressing . . .
5. Eating . . .
6. Toileting . . .
7. Mobility. . .

Appendix B: A substantial functional limitation is a child's inability to perform daily functions without extensive, hands-on assistance significantly beyond the age at which similar aged peers typically require such assistance. This assistance must be needed by the child to complete the task or function at all, rather than to complete the task better, more quickly or to make the task easier.

In order for a limitation to be considered a substantial functional limitation, it must:

- Be the direct result of the child's disability; and
- Be exhibited most of the time; and
- Result in the child needing extensive, direct, hands-on adult intervention and assistance beyond the level of intervention similar aged peers typically require in order to avoid institutionalization.

In addition, the child must

- Require the assistance consistently, and
- Require the assistance for at least the next 12 months, and
- Require the assistance to complete the function across all settings, including home, school and community.

The basis for the agency's denial was that the Petitioner does not require daily nursing interventions and does not have substantial functional limitations. The agency has the burden of proof in a benefit discontinuance case. See, e.g., *State V. Hanson*, 98 Wis. 2d 80 (Wis. App. 1980). That burden is the preponderance of the credible evidence. If the agency presents a prima facie case supporting its position the Petitioner may rebut that case. In this case, I find the Department's written position is conclusory without specific demonstration or analysis as to why or how it made its findings.

The Petitioner has diagnosis of chronic lung disease. In this case, the Petitioner's nutritional needs are met with G-tube feedings 4x/day. He is currently in a feeding therapy program to improve his oral intake but the evidence indicates that he will likely require G-tube feedings for at least the next six months. In addition, he has a history of aspiration and needs cueing for chewing and swallowing. Therefore, he requires constant supervision and assistance during any oral feeding episodes. Based on this evidence, the Petitioner meets the criteria of requiring at least one skilled nursing intervention daily.

With regard to substantial functional limitations, the evidence indicates the Petitioner has limitations with regard to learning, communication, bathing, toileting and eating. The agency contends that the Petitioner has no substantial functional limitations but provides no specific evidence with regard to how it arrived at that conclusion. With regard to learning and communication, no evidence was presented with regard to standardized measures of the Petitioner's expressive and receptive communication functioning. On a practical level, it is clear that the Petitioner's limitations are significant for a 5 year old. He uses only 2 – 4 words and he can follow only simple directions. I do not know if the previous determination finding the Petitioner eligible for Katie Beckett considered his limitations to be substantial in these areas. If so, it is

the agency's burden to demonstrate that the Petitioner no longer meets the criteria. Without more evidence, I cannot make a determination that he no longer meets the criteria. Based on the evidence that was submitted, it appears that he does have a significant functional limitation in communication and learning.

There is sufficient evidence to demonstrate substantial functional limitations with regard to self-care. The Petitioner requires total assistance with eating, toileting and bathing.

The Petitioner previously met the criteria for eligibility for the Katie Beckett program. The evidence presented for this hearing demonstrates that the Petitioner requires a daily skilled nursing intervention and has substantial functional limitations in learning, communication, bathing, eating and toileting. In finding the Petitioner is no longer eligible, the burden is on the agency to demonstrate why the Petitioner does not meet the eligibility criteria. In this case, the agency's evidence is insufficient for me to determine what has changed in the agency's view with regard to the Petitioner's limitations and why the agency found he no longer meets the criteria.

### **CONCLUSIONS OF LAW**

The agency did not properly deny Petitioner's eligibility for the Katie Beckett program.

**THEREFORE, it is**

**ORDERED**

That this matter is remanded to the agency with instructions to restore Petitioner's Katie Beckett eligibility. This must be done within 10 days of the date of this decision.

### **REQUEST FOR A REHEARING**

This is a final administrative decision. If you think this decision is based on a serious mistake in the facts or the law, you may request a rehearing. You may also ask for a rehearing if you have found new evidence which would change the decision. Your request must explain what mistake the Administrative Law Judge made and why it is important or you must describe your new evidence and tell why you did not have it at your first hearing. If you do not explain these things, your request will have to be denied.

To ask for a rehearing, send a written request to the Division of Hearings and Appeals, P.O. Box 7875, Madison, WI 53707-7875. Send a copy of your request to the other people named in this decision as "PARTIES IN INTEREST." Your request for a rehearing must be received no later than 20 days after the date of the decision. Late requests cannot be granted.

The process for asking for a rehearing is in Wis. Stat. § 227.49. A copy of the statutes can be found at your local library or courthouse.

### **APPEAL TO COURT**

You may also appeal this decision to Circuit Court in the county where you live. Appeals must be served and filed with the appropriate court no more than 30 days after the date of this hearing decision (or 30 days after a denial of rehearing, if you ask for one).

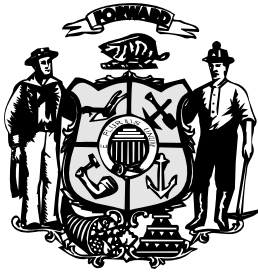
For purposes of appeal to circuit court, the Respondent in this matter is the Department of Health Services. After filing the appeal with the appropriate court, it must be served on the Secretary of that Department, either personally or by certified mail. The address of the Department is: 1 West Wilson Street, Madison, Wisconsin 53703. A copy should also be sent to the Division of Hearings and Appeals, 5005 University Avenue, Suite 201, Madison, WI 53705-5400.

The appeal must also be served on the other "PARTIES IN INTEREST" named in this decision. The process for appeals to the Circuit Court is in Wis. Stat. §§ 227.52 and 227.53.

Given under my hand at the City of Milwaukee,  
Wisconsin, this 1st day of April, 2013

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\sDebra Bursinger  
Administrative Law Judge  
Division of Hearings and Appeals



**State of Wisconsin\DIVISION OF HEARINGS AND APPEALS**

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The preceding decision was sent to the following parties on April 1, 2013.

Bureau of Long-Term Support  
Division of Health Care Access and Accountability